STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH S. RICHARDS,

Plaintiff-Appellee,

v

MARY E. RICHARDS,

Defendant-Appellant.

UNPUBLISHED
January 24, 2003

No. 235836
Macomb Circuit Court
LC No. 99-004924-DO

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted the post divorce order regarding the provisions of a qualified domestic relations order (QDRO). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties agreed to a consent judgment of divorce containing the following provision regarding financial accounts:

> It is further ordered and adjudged that plaintiff's 401(k), defendant's 401(k), plaintiff's two IRA's and certificates of deposit be divided as follows:
>
> The total sums in the accounts will be divided whereby plaintiff shall receive the first $94,000 of the account and the balance of the accounts as of February 28, 2000 shall be divided equally between plaintiff and defendant.

The $94,000 awarded to plaintiff offset the value of the marital home awarded to defendant.

Plaintiff's 401(k) account balance dropped dramatically after the judgment was entered, and he objected to the entry of a QDRO using the February 28, 2000 valuation date. The trial court found that the parties' failure to provide for stock market fluctuations was a mutual mistake, and it ordered that the QDRO be based on the present value of the accounts. "Property settlement provisions in a divorce judgment are typically final and cannot be modified by the court." *Quade v Quade*, 238 Mich App 22, 226; 604 NW2d 778 (1999). Absent fraud, duress, or mutual mistake, courts must uphold divorce property settlements reached through agreement of the parties. *Id*.

We agree with the trial court that the parties made a mutual mistake by failing to consider and provide in their agreement for a severe drop (or increase) in the value of the accounts after February 28, 2000, but before distribution. Because of that mistake it became impossible to implement the consent agreement as written – each of the parties could not receive an equal division, i.e., one-half, of the value of the accounts as they were on February 28, 2000. To apply the agreement as defendant argues would subvert the clear intent of the parties to divide the account equally; defendant would receive a much larger amount than plaintiff.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot